No. 21308

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RONALD E. GATES,
Appellant,

vs.

P. F. COLLIER, INC., a Delaware Corporation,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII.

BRIEF FOR THE APPELLANT

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BRIEF FOR THE APPELLANT

JURISDICTION

The appellant, a citizen of the State of Hawaii, filed a complaint against Appellee, a corporation organized in Delaware and having its principal place of business in New York, in the United States District Court for the District of Hawaii on the 9th day of July, 1964, alleging diversity of citizenship and claiming an amount in excess of $10,000.

all under 28 U.S.C.A. 1332. (Rec. 361)[1] Appellee filed a counterclaim on July 30, 1964 conceding the jurisdictional claims of Appellant. (Rec. 379) (Tr. 3) After a jury-waived trial, the trial court on July 8, 1966 entered judgment on the counterclaim for Appellee and dismissed Appellant's complaint. (Rec. 685) Notice of Appeal was filed on the 13th day of July, 1966. (Rec. 713) This appeal is based on the general appellate statute 28 U.S.C.A. 1291, which gives this court jurisdiction for appellate review of final decisions of the court below.

SPECIFICATION OF ERRORS

1) The trial court erred in finding and concluding that the April, 1960 and September, 1961, Gates-Collier contracts were not in violation of the Foreign Exchange and Foreign Trade Control Law of Japan in that:

a) The agreements were schemes to violate said law by converting from Japanese yen and sending out of Japan by padding invoices under its 97B account (Japan Civilian) U.S. Dollars Colliers was prohibited by said law from sending out and paying Appellant, an exchange resident, U.S. Dollars in the United States, an act also prohibited by said law.

b) The agreements were schemes to violate said law by sending out of Japan under its 96B account (Military personnel), U.S. Dollars Colliers was prohibited by said law from sending out and paying Appellant U.S. Dollars in the United States, also prohibited by said law.

1—(Rec. ...) means the pleadings, interrogatories and answers, admissions and trial briefs filed below and transmitted as part of record.
(Tr. ...) means the transcript of testimony transmitted as part of record.

c) The agreements required prior Japanese Governmental approval because they were service contracts; said law required such approval but no such approvals were obtained.

d) That the agreements contemplated sending out of Japan to New York book orders; that this could not be done by Colliers without a license under said law; no such license was received.

2) The trial court erred in not finding and concluding the agreements of April. 1960 and September, 1961, illegal, not only under the Japanese law, but under the New York law as well because in New York a contract entered into in New York to violate a law at the place of performance (Japan) is also illegal in New York.

3) The trial court erred in finding and concluding that Appellant was not entitled to any recovery under Count I of the Appellant's complaint based on quantum meruit in that the contracts were illegal contracts malum prohibitum and Colliers is liable under New York law (place of enrichment) on quantum meruit counts for the unjust enrichment under such circumstances.

4) The trial court erred in finding and concluding that Appellant embezzled and committed fraud in Japan, with relation to Appellant's acts in Japan when Colliers did not prove the Japanese statute on embezzlement nor the Japanese substantive law of fraud where one sues for damages for fraud in a civil suit.

5) The trial court erred in finding and concluding that the Tokyo District Court decree enjoining Colliers from interfering with Appellant in the performance of his con-

tract in Tokyo as a Representative of Colliers was fraudulently obtained in that there was no fraud proven, no law or civil fraud of Japan was proven and further the law is that an order or judgment of a foreign court cannot be voided by the trial court merely by proof that the testimony or affidavit presented to the court in Japan was not accurate.

6) The trial court erred in not finding and concluding that there were three divisible portions with relation to the contracts of April, 1960 and September, 1961 and that since the defense of fraud concerned only the 97B (Japanese Civilian) portion, Colliers had no defense to the 96B (Military) and 98B (Australian) portions of the contracts.

7) The trial court erred in finding and concluding that Collier's Exhibits B-13 A, B and C were evidence of fraud and embezzlement and found fraud and embezzlement based thereon in that the entries were only book entries and the acts of Appellant in Tokyo were in exact accordance with written directions of Colliers and since Appellant followed Collier's written directions, Appellant cannot be found engaged in any fraud or embezzlement; that the trial court's finding and conclusion that there was no debtor and creditor relationship between Appellant and Colliers was in error in that said finding and conclusion is contrary to the admissions of Collier's officers and the written documents introduced as evidence in this case.

8) The trial court erred in finding and concluding that damages to the extent of $169,013 were proximately caused by the fraudulent acts and acts of embezzlement

of the Appellant in that there was no evidence to support such a finding.

9) The trial court erred in denying Appellant's objection in the lower court that by an election to terminate the contract in the manner Colliers did and suing in tort for damages, Colliers rescinded its contract of September, 1961 and Colliers cannot thereafter sue on said contract for rights and obligations to accrue subsequent to said termination under said contract because the contract was annihilated by said rescission and the trial court erred in granting Colliers $169,013 as damages based on the 12½% and 10% clauses in the contract which could be assessed based on collection losses appearing subsequent to said date of termination.

10) The trial court erred in finding and concluding that Colliers was damaged in the sum of $25,000.00 for attorney's fees and $11,011.99 for travel expenses, in that under the causes of actions alleged in the counterclaim Colliers isn't entitled to recover anything and further it did not have a defense of fraud as it alleged.

11) The trial court erred in finding and concluding that Appellant is not entitled to recover anything and awarding Colliers judgment in the sum of $306,676.25 in that on the evidence and the law, judgment should have been in favor of Appellant in the sum of $422,804.98 and the counterclaim of Colliers should have been dismissed.

STATEMENT

This case involves a complaint by Gates, appellant, regarding commissions in the sum of $422,804 allegedly due

appellant Gates from Appellee Colliers for the selling of Collier's encyclopedias in the sum of $1,810,262 (U.S. Dollars) in Japan, Australia, and other Pacific countries during the period April, 1960 to October, 1962. (Rec. 361) Colliers filed counterclaims based on alleged embezzlement, stealing, fraud, dishonesty, conversion, breach of contract and debt, all in the sum of $833,115. (Rec. 381)

The jury-waived trial below was materially aided especially in the area of arithmetic, by a stipulation between counsel that all interrogatories and answers on record and requests to admit with the admissions on record, may be considered by the trial court without any restrictions. (Tr 295-297) The interrogatories, answers and admissions are part of the record in this Appeal. (Rec. 19-278)

Appellee, Collier, a Delaware corporation with its principal office in New York, is a publisher of encyclopedias. Starting on or about 1954 Appellant Gates, a native of Dallas, Oregon (Tr. 236) then in Japan, started selling Collier's encyclopedias in Japan under an arrangement whereby Gates purchased Collier's encyclopedias outright at $69.00 per set under a strictly buyer-seller arrangement. (Tr. 72) Gates also started selling Collier's encyclopedias on an independent contractor basis to military personnel serving in Japan. This dual arrangement continued till later reduced to written agreements. By 1959 there existed between Colliers and Gates & Son Co., a Japanese corporation, two written contracts. The first contract, Plaintiff's Exhibit 5 in Evidence, expressed the abovementioned buyer and seller agreement at $69.00 per set. The second contract dealing with military sales on an independent contractor

basis (expressly providing that no employer-employee relationship existed) is evidenced by Plaintiff's Exhibit 4 in Evidence.

On or about April 15, 1960, an agreement consolidating the abovementioned agreements, Exhibits 4 and 5, into a single contract, Plaintiff's Exhibit 1 in Evidence, was entered into between Appellant Gates personally and Collier. (Plaintiff's Exhibit 2 in Evidence replaced said Exhibit 1 in September, 1961, for reasons immaterial herein.) Collier after entering said agreement Exhibit 1 registered to do business in Japan. Japan was then and still is under Foreign Exchange Control. (Exhibit 98) Collier was experienced in the area of international monetary manipulations in that Collier had prior "trouble" in black market operations of getting U.S. Dollars out of countries where there was exchange control, for example it cost Collier a painful $.25 (U.S.) per U.S. Dollar to get money out of Egypt. (Exhibit 118) Therefore Collier started its business in Tokyo with as little of its own U.S. Dollars as possible and tried to get the maximum out as possible, including Gates' share of the proceeds of sale. It started on the Japanese yen equivalent of $3,600.00 advanced by Gates and books borrowed from Gates Co. (Tr. 350) They intended to not pay Gates his commissions on Japanese yen sales till yen accumulated from the sales of Colliers books in Tokyo. The selling was done for Gates by about 15 salesmen of R. E. Gates & Son Co., Ltd. (Tr. 269) It was stipulated in open court that Gates himself was an employee of R. E. Gates & Son Co., Ltd. (Tr. 344, 354). A set of encyclopedia with an Atlas and Dictionary sold for 92,700 Japanese yen or $269.50 (U.S. Dollar equivalent). Gates was immediately entitled to 34% ($83.84) of

the net sales price as sales Commission on any sale, cash or term, even where down payment was $10.00. (Plaintiff's Exhibit 1 in Evidence) If 50% of the purchase price was paid within 15 months, Gates was entitled to another 7%. Gates was allowed to give a 5% discount to each customer but where he did not give the 5% discount, he was allowed to keep the 5% himself. (Plaintiff Exhibit 17 in Evidence) If sales reached a million dollars per 12 month period he was entitled to a 2% bonus and 1% if in excess of half a million but below a million. (Plaintiff's Exhibits 1 and 2 in Evidence)

The contract further provided that Gates guarantee Colliers against loss by reason of bad accounts. (Plaintiff's Exhibits 1 and 2 in Evidence) A so called 12.5% expected loss clause was written into the agreement so that in effect any losses in excess of 12.5% of the sales will be charged against Appellant Gates and if there were no losses Gates received the 12.5%. Any losses between 12.5% and zero were treated in a manner more particularly described in the argument below. By losses under the April, 1960 and the September, 1961 agreement Colliers meant "loss to Collier during the term of this agreement". (Tr. 418) (Plaintiff's Exhibit 1 in Evidence)

The evidence below was uncontradicted regarding the contract of April, 1960 and its substitute of September, 1961, being divisible into three parts:

a) Sales to Japanese Civilian (97B) and Japanese Schools (99B)

b) Sales to U. S. Military Personnel (96B)

c) Sales in Australia (98B)

"B" meant a separate branch. See footnote 8 page 44.

The parties agreed to give the parts the numbers indicated and each part was operated and dealt with and accounted for separately. (Plaintiff's Exhibit 9 in Evidence) The employees for each part were separate groups. 97B and 99B Sales (Japanese Civilian and Schools) were necessarily conducted by a Japanese Sales staff in Tokyo with sales in Japanese Yen. The U. S. Military personnel Sales (96B) were handled by another set of salesmen on a U. S. Dollar basis, clearly separate and apart from the foregoing 97B and 99B, (Tr. 123, 164) The Australian Sales 98B was under a separate contract made in January, 1962 and it was handled through a separate staff and office in Sydney, Australia. Australian sales were in Australia and Australian Currency. (Tr. 173-175) Gates was charged by Collier for alleged fraud on the 97B (Japanese Civilian and Schools) accounts but as for the 97B (Military) and 98B (Australian) accounts, by Collier's own admission in court by Mr. Brown there was no wrong committed and the alleged fraud if any was with respect to said 97B (Japanese Civilian) account only. (Tr. 35-36) Therefore Gates argued in the court below that as for the 96B (Military) and 98B (Australian) parts of the divisible contracts Colliers had no defense. The contracts were subject to termination only upon the giving of two weeks' written notice. No such notice was given till sometime in October, 1962. Gates claims that all parts of the divisible contracts were never terminated lawfully till October 16, 1962 and the summary possession and takeover by Colliers of all three parts of said divisible contracts, in May, 1962, was illegal.

Appellant Gates introduced an official English trans-

lation of the Japanese Foreign Exchange and Foreign Trade Control Law in evidence. (Plaintiff's Exhibit 98 in Evidence) Gates contended in the court below that Colliers knowingly schemed and planned to violate said Japanese Law when prior to April 15, 1960, it was licensed under said Japanese Foreign Exchange Law to receive in New York $69.00 (U. S. Dollars) per set for its encyclopedia sold by Gates Co. in Tokyo, Japan (Plaintiff's Exhibit 23 in Evidence) but subsequent to said date after Plaintiff's Exhibit I was entered into, Collier was licensed to receive $153.00 (U. S. Dollars) for the same set of encyclopedia (Plaintiff's Exhibit 24 in Evidence). Collier's General Superintendent and Assistant Secretary Simon J. Nork admitted in his sworn answers to interrogatories filed in this cause that the sudden increase in the import licenses from $69.00 per set to $153.00 per set was the *"proper value to assign to each set of Collier's Encyclopedia for Japanese currency control purposes."* (Rec. 261) It will be shown in the argument to follow that the abrupt increase was due to a scheme to send out of Japan, funds Colliers could not legally send out, an out and out "yami" operation, meaning black market in Japanese. Appellant Gates contended in the court below that for this reason the entire Japanese Civilian and Schools, 97B and 99B phases of the contracts were absolutely illegal.

There was an "Outline of Procedure for Opening a Branch in Tokyo, Japan" dated April 1, 1960, introduced in evidence as Plaintiff's Exhibit 9 in Evidence. One of the purposes of the said Outline was to supplement the con-

tract of April 15, 1960, in certain areas where the said contract cannot be more explicit because if expressed more fully in the contract, the contract would on its face flagrantly violate the Japanese Foreign Exchange and Foreign Trade Control Law. For Military sales this Outline expressly provided that the U. S. Dollars collected in Tokyo by Gates shall be directly sent out of Japan to Colliers at New York and that R. E. Gates received his 34% commission in U. S. Dollars by drawing on an "imprest fund" checking account entitled "P. F. Collier Inc., Japan Branch, Tokyo, Japan" established by Colliers with the Long Island Trust Co., Garden City Park, L. I., New York. (Plaintiff's Exhibit 109 in Evidence) It was submitted in the court below that this unlicensed outflow of U. S. Dollars from Japan plus illegal payments to a Japan resident of U. S. Dollars made the 96B (U. S. Military) portion of the contract illegal under the abovementioned Japanese Foreign Exchange and Foreign Trade Control Law. The said Japanese law also prohibited contracts for services involving payment, settlement or any other transaction governed by the provisions of the law unless approved by the Japanese Government. Neither the contract of April, 1960, nor that of September, 1961, were approved. (Tr. 987) Appellant claims that the contracts violated said Exchange law in several other material respects as more fully elaborated in the argument to follow.

Documentary proof Plaintiff's Exhibit 13 in Evidence showed mathematically the division of the $269.50 (unit

price per set) in Gates' rights and Collier's rights was as follows:

Gates Rights (59.5%)			
34%		$84.83	
7%		17.47	
5%		12.50	
12.5%		33.69	
1%		2.70	$151.19
Colliers Rights (40.5%)			
40.5%		$118.31	118.31
Total 100%		Total	$269.50

The $172.00 remitted to New York per set under the Japanese Import license was made up (Tr. 285) of the following:

Colliers' Rights		
40.5%		$118.00
Gates' Rights		
12.5%		34.00
7%		17.00
1%		1.00
	Total	$172.00

Therefore out of each sale of $269.50, after deducting $84.83 as the 34% commission due Gates and further deducting $172.50, the remittance requirement, there remained only $12.17. If Gates gave a 5% discount of $12.50 to the customer nothing remained in his hands. These remittances of $172.50 per set were not earmarked. Instead, the remittance requirement in the invoices and licenses was for example on a shipment of hundred sets: "Full

amount of invoice covering cost of books, payable in U. S. Dollars in twelve (12) equal monthly installments, starting 30 days from the time this shipment of books has cleared through customs into Japan". (Tr. 250) And so the total of monthly remittances sent, ran from $6,000.00 to $18,000.00. (Rec. 139-146) Gates did not at any time default in any of these requirements and sent from Tokyo to New York a total of $210,000. (Rec. 139-146)

With relation to the alleged charges by Collier of embezzlement by Gates under the 97B Japanese Civilian accounts, the basis of Collier's claim is Exhibits B-13 A, B and C which Collier claimed showed that certain alleged C.O.D. Japanese yen sales in Japan to Japanese Civilians were reported as term sales. *The Japanese Statute on embezzlement was not introduced in evidence by Colliers.* There was no proof as to what was the substantive Japanese law of conversion, stealing, fraud or deceit, applicable to the situation or circumstances in this case. The record was abundant with proof of debit and credit between Colliers and Gates. (Tr. 149) Colliers owed Gates and Gates owed Colliers large sums of money. Colliers conceded that where there was a term sale, even when there was only a yen equivalent of $10.00 as down payment, there became due immediately to Gates the 34% commission of $84.83 less however the $10.00 received or $74.83. (Tr. 89-90) Colliers owed this amount to Gates on each of these term sales made in Tokyo, Japan. There were 1404 term Japanese yen sales (Rec. 36) (2449–1095=1404) or a total of $119,101.32 (84.83 X 1404) was involved. Collier was in no position to pay this large sum to Gates except by following the Outline above mentioned and making pay-

ment to sales people as follows: "*After the Tokyo Bank Account has sufficient yen deposits, the sales people paid on yen accounts will be paid in yen from this account.*" After meeting the monthly remittance requirements Gates did what he was authorized to do in writing. He did not follow Exhibits B-13 A, B and C in his operations in Tokyo but followed Collier's "Outline of Procedure for Opening a Branch in Tokyo, Japan" and the directions as to remittances in Collier's invoices and Import licenses. Gates contended in the court below that under such circumstances there was no fraud or embezzlement. Primarily, since Colliers didn't prove the Japanese Law in relation thereto and further because there could be no fraud where Gates handled the money as he was ordered to do. He had a general power of attorney from Colliers for his Tokyo operations. Plaintiff's Exhibit 82 in Evidence.

Gates claimed commissions due him, as follows:

Account	Due to Gates
97B & 99B	$ 81,339
96B	153,448
98B	188,017
	$422,804

Gates claimed gross sales of $1,810,262 on figures admitted by Colliers. By charts Gates showed that the above commissions of $422,804.06 are still due him. The charts are repeated in the argument to follow.

On the above facts the court below dismissed Gates' complaint completely and entered judgment for Colliers and against Gates on its counterclaim in the sum of $306,676.23. (Rec. 686)

ARGUMENT

I

The April, 1960 and September, 1961, Gates-Collier Contracts Were Flagrant Violations of the Foreign Exchange and Foreign Trade Control Law of Japan.

The contracts of April, 1960, Plaintiff's Exhibit 1, and September, 1961, Plaintiff's Exhibit 2, were violent violations of the Japanese Foreign Exchange and Foreign Trade Control Law of Japan. The official English translation of the law is in evidence in this case. Plaintiff's Exhibit No. 98 in Evidence.

The contracts were violations because of the several major violations hereinafter discussed. *From their inception the contracts were planned and schemed to violate the said Japanese Foreign Exchange and Foreign Trade Control Laws*; these violations were with knowledge and contemplated by Colliers and Gates. Foreign laws having effect on Americans doing business in foreign countries were only recently reviewed by the Supreme Court with much concern and care "*because the issues involved bear importantly on the conduct of the country's foreign relations and more particularly on the proper role of the Judicial Branch in this sensitive area.*" *Banco National de Cuba* v. *Sabbatino*, (1964) 376 U.S. 398, 84 S. Ct. 923, 929. It is submitted that to nations such as Japan which rely on foreign trade extensively, this court's construction of Japan's Foreign Exchange and Foreign Trade Control Law herein will be material and will affect future foreign relations. This court will be taking a role in a very "sensitive area".

The purpose of said Japanese Foreign Exchange Law is stated as follows:

> "Article 1. The purpose of this Law is to provide for the control of foreign exchange, foreign trade and other foreign transactions, necessary for the proper development of foreign trade and for the safeguarding of the balance of international payments and the stability of the currency, as well as the most economic and beneficial use of foreign currency funds, for the sake of the rehabilitation and the expansion of the national economy." (Plaintiff's Exhibit 98 in Evidence, page AA1)

Violations of the said Japanese Foreign Exchange Laws are subject to "penal servitude not exceeding three years" or to fine not exceeding 300,000 yen or both. (Plaintiff's Exhibit 98 in Evidence, page AA 16-17)

And the Civil Code of Japan, Plaintiff's Exhibit 100 in Evidence, page FA16, provides as follows:

> "Article 90. A Juristic act which has for its object such matters as are contrary to public policy or good morals is null and void."

The trial court with relation to the argument that the contracts of April, 1960 and September, 1961, violated said Japanese Foreign Exchange Law found and concluded that they were not illegal. (Rec. 639-642)

It is submitted that the trial court erred in the above findings and conclusions in that the contracts of April, 1960 and September, 1961 (Plaintiff's Exhibits 1 and 2 in Evidence), were illegal for the following reasons:

A.—The Japanese Civilian (97B) Portion of Contract Was Absolutely Illegal under the Japanese Foreign Exchange Laws.

Under Articles 27, 28, 29 and 30 of said Japanese Foreign Exchange Laws (Plaintiff's Exhibit 98, pages AA8-9) it is provided under the title "Restriction and Prohibition of payment", as shown in footnote 2 below. And

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2—"Article 27. Unless authorized as provided for in this Law or in Cabinet Order, no person shall in Japan:

(1) Make any payment to a foreign country;

(2) Make any payment to an exchange non-resident or receive any payment from an exchange non-resident;

(3) Make any payment to an exchange resident on behalf of an exchange non-resident or receive such payment;

(4) Place any sum to the credit of an exchange non-resident or receive any sum for credit from an exchange non-resident." (Plaintiff's Exhibit 98, page AA8.)

"Article 28. Unless authorized as provided for in this Law or in Cabinet Order, no person shall in Japan and no exchange resident shall abroad make any payment to or for the credit of an exchange resident as a consideration or association with payment or other benefit accruing to anyone abroad or acquisition of property abroad."

"Article 29. Unless authorized as provided for in this Law or in Cabinet Order, no person shall in Japan and no exchange resident shall abroad receive any payment from or on behalf of an exchange resident as a consideration or association with surrender of any value abroad."

"Article 30. No person may be a part to creation, modification, liquidation, settlement or direct or indirect transfer of the following items or to any other transaction of the same, unless authorized as provided for by Cabinet Order;

(1) Claimable assets expressed in National currency between exchange non-residents;

(2) Foreign claimable assets between exchange residents;

(3) Claimable assets between an exchange resident and an exchange non-resident."

"exchange residents", "exchange non-residents" and "claimable assets" are defined (Exhibit 98, pages AA2-AA3) as shown in footnote 3 below.

Colliers obtained under said law import licenses (Tr. 97, 100) and for each imported encyclopedia set with accompanying books, Colliers was licensed to remit $172.50 out of Japan. (Tr. 280) It is submitted that Colliers in its invoices and application to remit funds padded and included in the $172.50, sums illegal to remit.

Documentary proof, Plaintiff's Exhibit 13[4] in Evidence, showed mathematically how the Tokyo retail sale price of

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3—"Article 6. In order to make uniform the application of this Law and orders issued in accordance therewith the following terminology shall be defined to mean:

(5) 'Exchange residents' shall mean all natural persons who have their permanent place of abode or who customarily live in Japan, and also juridical persons (corporate bodies, enterprises), having their seat or place of administration in Japan. The branches in Japan (agencies, establishments, etc.) of exchange non-residents are considered to be exchange residents irrespective of whether they are independent in law or not and even if the place of their administration or their headquarters is located abroad.

(6) 'Exchange non-residents' shall mean all persons, natural or juridical, other than those falling under the meaning of exchange residents.

(13) 'Claimable assets' shall mean time deposits, demand deposits, insurance policies and claims, balances in current account, any claims to be paid such as arising out of loans or bids or any other claims, expressed in terms of money insofar as they are not embodied within the meaning of other items of this Article."

4—

	Gates rights (59.5%)		
	34%	$84.83	
	7%	17.47	
	5%	12.50	
	12.5%	33.69	
	1%	2.70	$151.19
	Colliers rights (40.5%)		
	40.5%	118.31	118.31
Total	100%	Total	$269.50

$269.50 per set was split. The figures are based on percentages recited in the contracts of April, 1960 and September, 1961 and so Colliers is in no position to deny them. Collier's right was only $118.31. Why was $172.00 sent out of Tokyo? Gates testified (Tr. 285) that the $172.00 was made up of the following percentages in round figures:

Colliers Rights		
40.5%	$118.00	$118.00
Gates Rights		
12.5%	34.00	
7%	17.00	
1%	3.00	54.00
	Total	$172.00

Gates' testimony is corroborated by the very fact that the figures based on the contract percentages add to $172.00. So some of Gates' own funds and claimable assets were *sent to New York*. Colliers was entitled to ship out only $118.31 but padded it to $172.50 to send some of Gates' funds and claimable assets to New York. Defendant's counsel admitted that Colliers paid Gates within the United States in or about the latter half of 1961 the sum of $18,834.24 (U.S. Dollars) on account of the 12½% commission due. (Tr. 385-387) See also Plaintiff's Exhibit 93 in Evidence confirming the above illegal payments. Plaintiff's Exhibit 75 shows 7% bonus payments of $262.05 and $23,357.49. All of these were clear violations of Article 27 above recited.

In addition to the above proof of violation, the violation is further supported by proof that prior to 1960 when the 1959 contract was in force, Plaintiff's Exhibit 4 in Evi-

dence, Gates was licensed to send out of Japan *only* $69.00 per set. See also Plaintiff's Exhibits in Evidence 93 and 69. After April 15, 1960, the said $69.00 per set was raised to $172.50. Why was this done? Collier's officer Nork under oath in his answer (filed November 10, 1964) to written interrogatories filed in this cause stated as follows:

> "59—The unit price assigned to Collier's Encyclopedia 20v. Black Fab. is different in Exhibits 62 and 64 ($69.00) from Exhibits 61 and 63 ($172.50) in order to reflect a different, but irrelevant to this lawsuit, accounting allocation of costs to defendant." (Rec. 177)

Appellant Gates was not satisfied with the above answer so he further questioned Colliers on the quoted answer and witness Nork replied under oath as follows in its answers filed February 10, 1965:

> "Pursuant to an agreement dated April 15, 1960 between defendant's assignor and plaintiff (hereinafter the agreement of April 15, 1960) and pursuant to an agreement dated September 15, 1961 between defendant and plaintiff (hereinafter the agreement of September 15, 1961), under which agreements plaintiff sold Collier's Encyclopedia on a commission basis, *defendant's assignor and defendant had to declare the value of Collier's Encyclopedia imported to Japan for the purpose of Japanese currency control regulations.*
>
> "The value of $153.00 per set, as reflected in Exhibits 62 and 64 attached to Plaintiff's Interrogatories No. 2. *was fixed pursuant to the advice and with the consent of plaintiff, Ronald E. Gates.* Under the agreements of April 15, 1960 and September 15, 1961, de-

fendant's assignor and defendant understood that $153.00 *was the proper value to assign to each set of Collier's Enclyclopedia for Japanese currency control purposes.*" (Rec. 260-261)

Both of the above answers were under oath of witness Simon J. Nork. Mr. Nork well understood the situation and he well knew that the "Japanese Currency Control" purposes were involved. Any invoice raised 121% from $69.00 to $153.00 overnight cannot be explained in terms of additional freight and service charges because Colliers after April 15, 1960, charged Gates about $20.00 per set for freight and service charges. This is admitted in the record in Collier's answers to interrogatories filed February 10, 1965 (Rec. 268), 2079 sets at $20.00 per set is $41,580 while 150 sets at $20.00 per set is $3,000.00. Which is reasonable in that "inland Freight, Insurance, Forwarders Fees and Ocean Freight for 100 sets amounted to only $1,098.35 or about $10.98 per set. (Plaintiff's Exhibit 23 in Evidence)

Gates' testimony is further corroborated by the fact that Collier in its vouchers of different dates in order to make the padded figure of $172.50 varied the values of books. For example Plaintiff's Exhibit 26 in Evidence dated July 28, 1960, listed the books as follows:

Cyclopedia (Fab.)	$153.00
Atlas	9.50
Dictionary	5.00
Home Repair Book	5.00
	$172.50

But in Plaintiff's Exhibit 83 in Evidence at pages 2, 3, 4 dated June 19, 1961, November 8, 1961 and April 14, 1961, the unit price on the same Atlas and Dictionary are quoted as follows:

Cyclopedia (Sturdite)	$155.50
Atlas	10.75
Dictionary	6.25
	$172.50

The foregoing glaring discrepancy shows that to Colliers it was more important to obtain the constant figure $172.50 because it also included Gates' commissions and book values were varied to carry out the illegal scheme.

B. The U.S. Military 96B Portion of the Contract Was Illegal under the Japanese Foreign Exchange Laws.

The contracts of April, 1960 and September, 1961, covered sales to Military personnel under 96B accounts. The "Outline of Procedure for Opening Toyko Branch" Plaintiff's Exhibit 9 in Evidence clearly covered Dollar Sales as well as yen sales. (Tr. 81) Paragraph 5(e), page 2, differentiates the two and the Dollar sales were supplied with an "imprest fund" at the Long Island Trust Co., Garden City Park, L. I., N. Y., on which Gates had the power of attorney to draw to pay commissions due him on these Dollar Sales. (Tr. 90)

The documentary evidence in this case, Plaintiff's Exhibits 109 and 110 in Evidence, shows that "P. F. Collier Inc., Japan Branch, Tokyo, Japan" had a checking account at said Long Island Trust Co., Long Island, New York and checks were drawn on said account from Tokyo by Gates

and said Exhibit 110 shows that the checks drawn by Gates were deposited at the First National City Bank of New York, Wells Fargo Bank of San Francisco and the Chemical Bank of New York. The endorsements clearly show this. The funds for the imprest fund at Long Island were deposited by Colliers.

Based on Plaintiff's Exhibit 75 in Evidence, a document prepared by Colliers as Evidence and presented to the Tokyo District Court, the total amount remitted in this manner from April, 1960 to May 1, 1960, amounted to:

$ 97,452.00	
348,082.40	(Tr. 892, modified by stipulation)
$445,534.40	

The 34% commission paid to Gates according to said Exhibit 75 was:

$ 31,342.77
90,313.63
$121,656.40

And the total 7% commission paid to Gates was:

$ 86.78
9,731.33
$9,818.11

These sums were not insignificant. It is submitted that the 96B (Military) portion of the contracts were clear violations of the Japanese Foreign Exchange Laws. The violations were:

1) Sending of U.S. Dollars to a foreign country (United States); that is to "*make any payment to a foreign country*" without a license. (Art. 27(1), J.F.E.) (Plaintiff's Exhibit 98 in Evidence)

2) Making payment in U.S. Dollars to Colliers in New York or receiving payment in dollars from Colliers in New York without licenses; that is to "*make any payment to an exchange non-resident or receive any payment from an exchange non-resident.*" (Art. 27(2) J.F.E.) (Plaintiff's Exhibit 98 in Evidence)

3) Violation of Article 28 heretofore fully quoted.

4) Violation of Article 29 heretofore fully quoted.

5) Violation of Article 30 heretofore fully quoted.

C.—Contracts of April, 1960 and September, 1961, Were Service Contracts Which Required Prior Approval.

Under Sections 42, 43 and 44 of the Japanese Foreign Exchange Laws, the contracts of April, 1960 and September, 1961, were required to be approved by the Minister of Finance. Sections 42, 43 and 44 of Plaintiff's Exhibit 98 in Evidence are quoted in the footnote below.[5]

5— "Article 42. Unless authorized as provided for by Cabinet Order, no person shall contract for services *involving payment, settlement or any other transaction governed by the provisions of this law.*"

"Article 43. Unless authorized as provided for by Cabinet Order, no exchange resident shall render services to an exchange non-resident unless an adequate payment is provided in accordance with the provisions of this Law."

"Article 44. Any person or exchange non-resident as specified in the preceding two Articles may be required to obtain prior approval from or present certification of adequate payment to the competent Minister as provided for by Cabinet Order."

No such approvals were obtained in the present case. (Tr. 987) It is easy to defeat the purpose of these exchange laws by contracting for services and scheming to be paid therefor by illegal transactions above outlined in paragraphs A and B. The very purpose of Sections 42, 43 and 44 was to prevent what Colliers engineered in this case.

It is submitted that here again the Japanese Foreign Exchange Law was violated.

D—Illegal to Send Book Orders from Tokyo to New York.

The next violation was the sending out of Tokyo to New York the Yen or U.S. Dollar book orders so that Collier may borrow on said orders from its New York banks. Under Article 45 of said Foreign Currency Control Law which reads as follows:

> "Article 45. Unless authorized as provided for by Cabinet Order, no person may export or import means of payment precious metals, securities, or documents embodying rights to claimable assets."

these yen book orders exported were clearly "documents embodying rights to claimable assets." There is ample evidence in this case that these book orders were sent out. In fact, Colliers requested in writing that the original be sent to New York. (Tr. 985) (Plaintiff's Exhibit 126 in Evidence)

. . . . . .

Therefore it is submitted that when the contract of April 15, 1960, was entered into, it followed an illegal scheme and plan dated April 1, 1960, entitled "Procedure for Opening Tokyo Branch Office" on the fly leaf of which

appears the signature of S. J. Nork, a Collier officer. The September, 1961, contract was an exact reproduction of the April, 1960, contract and every element of illegality of the April, 1960, contract was carried into the September. 1961, contract. It is submitted that as above shown the parties to the contract contemplated, planned and schemed to violate the Japanese Foreign Exchange Laws. The plans contemplated an illegal smuggling out of hundreds of thousands of U.S. Dollars out of Japan without licenses contrary to the Japanese Foreign Exchange Laws.

The trial court findings relate to the Tokyo District Court proceedings. (Rec. 704, 707) The cases there were never tried. Therefore no evidence as extensive as in this case was produced and furthermore no final decision was rendered. The trial court should not have made such findings from inferences where no final decision was reached by the Tokyo District Court.

II

Effect of Illegality of Contracts of April, 1960 and September, 1961.

The next question is the effect of the illegality argued in foregoing Paragraphs I A, B, C and D of this brief. It is submitted:

1) That the contracts were illegal under the Japanese laws and,

2) That the contracts were illegal under the New York laws.

In 17 Am. Jur. 2d 507, the writer regarding illegal contracts violating the laws of another country states as follows:

> "Moreover, it is said to be well settled that if a contract *is entered into with the view of violating the laws of another country it is unenforceable,* even though it does not contravene the law of the place where it is made or the law of the forum." (Emphasis ours)

The foregoing is followed in *Hesslein* v. *Matzner,* (1940) 19 N.Y.S. 2d 402, wherein the court held as follows:

> "6. Williston on Contracts, Revised Edition, Section 1749, at pp. 4951, 4952, states:
>
> " 'On the other hand *if a contract or sale is made with a view of violating the laws of another country* though not otherwise obnoxious to the law either of the forum or of the place where the contract is made, *it will not be enforced.* The courts will treat bargains as against public policy which have for their object the violation of the law of a sister state.' (Emphasis ours)
>
> " 'This result may be reached either on the ground that it is directly opposed to the law of the place of the contract, or under a principle of the Conflict of Laws that the law of the place of performance is that which should be applied.'
>
> "(3) The contract in the case at bar, while not otherwise obnoxious to the law of New York, was made with a view of violating the laws of another country, and the courts of this state will treat it as against public policy and unenforceable.

"(4) Nor will the court give legal effect to the guaranty which plaintiff claims defendant made. The entire contract being unenforceable as illegal, this court will not attempt to enforce a guaranty which was an integral part of that contract."

The same rule was followed in *Butkin* v. *Reinfeld*, (1956) (C.C.A. 2, N.Y.) 229 F. 2d 215, Cert. Den. 325 U.S. 844, 77 S. Ct. 50, where the court stated:

"The trial judge further argued that since the L. L. & B. transaction took place in Canada the prohibition laws of the United States did not render it illegal. *But it now seems well settled that if a contract is entered into with a view of violating the laws of another country it is unenforceable even though it does not otherwise contravene the law of the place where it is made or of the forum.* 6 Williston on Contracts, § 1749 (rev. ed. 1938); Restatement of Contracts, § 592; Graves v. Johnson, 1892, 156 Mass. 211, 30 N.E. 818, 15 L.R.A. 834, Holmes, J. This appears to be the law of Canada as well. Walkerville Brewing Co. v. Mayrand, (1928) 4 Dom. L.R. 500, noted in 42 Harv. L. Rev. 436."

A 1954 case involving the German Foreign Exchange laws, *Callwood* v. *Virgin Islands Nat. Bank,* (1954) 121 F. Supp. 379 (rev. on other grounds 221 F. 2d 770), is exactly in point in the present case.

Therefore the contracts were illegal both under the Japanese Law as well as the New York Law.

III

Count I of Plaintiff's Complaint in Quantum Meruit Permits Recovery Where Alleged Wrong Is Malum Prohibitum.

Count I of plaintiff's complaint is a quantum meruit count. The enrichment was and is in New York where monies were sent by appellant and received by Colliers.

It is well settled in conflicts of laws, Section 453, Restatement of the Law of Contracts, that:

> *"When a person is alleged to have been unjustly enriched, the law of the place of enrichment determines whether he is under a duty to repay the amount by which he has been enriched."*

Defendant admitted that such is the law in the lower court. (Tr. 471)

The leading case in New York State on this subject is *John E. Rosasco Creameries* v. *Cohn*, 276 N.Y. 274, 11 N.E. 2d 908, 118 ALR 644, wherein it is stated:

> "Illegal contracts are generally unenforcible. *Where contracts which violate statutory provisions are merely malum prohibitum, the general rule does not always apply.* If the statute does not provide expressly that its violation will deprive the parties of their right to sue on the contract, and the denial of relief is wholly out of proportion to the requirements of public policy or appropriate individual punishment, the right to recover will not be denied. See Williston on Contracts, Vol. 3, Sec. 1789; Vol. 5 (2d Ed.) Sec. 1630. Cf. American Law Institute, Restatement of the Law of Contracts, Secs. 548, 600."

See also: *Application of Kamerman,* (1960) C.C.A. 2 N.Y., 278 F. 2d 411; *Watkins* v. *Sedberry,* (1923) 261 U.S. 571, 43 S. Ct. 411; *Re Joslyn,* (C.C.A. 7) 223 F. 2d 184.

See Annotation, Recovery for Legal Services in Quantum Meruit under a contract which is void as against Public Policy, 100 ALR 2d 1378.

See a 9th Circuit case, *Smith Engineering Co.* v. *Rice,* (1938), 102 F. 2d 492, where the court held as follows:

"(6) Appellee argues that the company is not entitled to recover, because if the contract and supplemental contract are void, the refiner is also relieved of its duty. While it is true, that neither party can be held under a void contract, the question here is whether, independently of the contract, the refiner is liable on the quantum meruit. In Montana, it is held that a county is liable on quantum meruit for goods purchased by it, although the contract is illegal and void, where the contract 'is merely malum prohibitum and did not contravene public policy.' Hill County v. Shaws' Borden Co., 9 Cir., 225 F. 475, 476; Hicks v. Stillwater County, 84 Mont. 38, 274 P. 296; Morse v. Board of Commissioners, 19 Mont. 450, 48 P. 745; State v. Dickerman, 16 Mont. 278, 40 P. 698. Since 7501 places illegal contracts, and contracts impossible of performance in the same category, and recovery on quantum meruit is allowed as to one, like recovery must be allowed on the other."

See also:

South American Petroleum Corp. v. *Colombian Petroleum Co.*, 177 Misc. 756, 31 N.Y.S. 2d 771, 773.

Central Hanover Bank & Trust Co. v. *Siemens & Halske,* (1936) 15 F Supp. 927 (Aff'd 84 F. 2d 993), Cert. den. 299 U.S. 585, 57 S. Ct. 110.

It is submitted that violations of the Japanese Foreign Exchange laws are malum prohibitum and therefore plaintiff should be allowed recovery under his quantum meruit counts.

There is not much dispute as to the total amount of sales from April 15, 1960 to October 16, 1962. Attached hereto at the end of this brief (page 75) marked Exhibit CC is a summary of the figures admitted by Colliers to be the total of the Australian 98B, Military 96B and Japanese Schools and Civilian 99B and 97-B sales, remittances and collections. Commissions earned, commissions received and commissions due, together with proper computation to show the amounts due. (Ans. to Interrogatories Rec. 265 to 278) Also attached are Exhibits DD (page 77) and EE (page 79) showing that Colliers is holding over their rights a total of $340,871.97.

Based on Exhibits CC, DD and EE above mentioned, Gates contends that he is entitled to the following recovery under his three quantum meruit counts:

Australia—98B.

Note, plaintiff's experience shows that 6/7 of the 36% commission is paid salesmen and used to cover expenses. Therefore 1/7 remains for plaintiff. Therefore see Exhibit CC, thus:

$ 30,065.05	(1/7 of $210,448.41)	(36% row)
40,920.52	.....	7% row
81,298.64	.....	12.5% row
6,503.89	.....	1% row
29,228.95	.....	5% row
$188,017.05	amount of suit	

Military—96B.

$159,989.89	34%	row
32,939.10	7%	row
61,496.65	12.5%	row
4,705.59	1%	row
23,527.93	5%	row

$282,659.16
–129,210.48 less commission received

$153,448.68 amount of suit

Japan Civilians and Schools, 97B and 99B.

$110,482.89
9,763.14

$120,246.03

–38,906.78 (12,426.58, acc't bal. + 26,480.20, Sales Discount)

$ 81,339.25 amount of suit

Total of 98B, 96B, 97B and 99B.

Australia 98B	$188,017.05
Military 96B	153,448.68
Japan Civilians 97B and Schools 99B	81,339.25
Plaintiff's Total Claim	$422,804.98

IV

Trial Court Erred in Finding and Concluding Embezzlement, Fraud and Criminal Breach Without Evidence of the Substantive Japanese Law on Subject

The trial court was fully advised in a "Pretrial Brief on Conflicts of Laws Problems in Case," filed by counsel for Gates, appellant, on December 10, 1965 (Rec. 525-531, at 529) that:

> "Colliers bases its counterclaim and defense on various acts of plaintiff (Gates) which took place in Japan. The law is clear that the law of the place of performance applies in these cases." (Rec. 529)

Since the law on the subject was so clearly presented in an article in 50 ALR 2d 254 entitled "What Law Governs in Determining Whether Facts and Circumstances Operate to Terminate, Breach, Rescind or Repudiate a Contract," appellant Gates quoted from said article (Rec. 529) as follows:

> "The general rule is that unless a contrary intention is expressed in the contract, matters connected with the performance are regulated by the law prevailing at the place of performance. Questions as to whether there is an *effective termination, breach, rescission, or repudiation of a contract have been recognized as matters of performance within the rule stated above. Where a contract is to be performed at more than one place, the law of the place in which the specific acts complained of as a breach or termination of the contract were done or to be done is controlling.* The law of the place of performance of a contract has also been held

to determine questions as to whether there is an excuse for nonperformance, such as illegality or impossibility of performance, whether a contractual right has been forfeited, and whether a contractual obligation has been discharged." (Emphasis ours)

In spite of the foregoing article and all the supporting cases cited in said article, the court found as shown in footnote 6.

In the first place the Japanese statute on embezzlement was not introduced in evidence. The substantive law of fraud of Japan as a basis for civil action for damages or as a defense was not introduced in evidence. After a clear warning by Gates that the law of Japan must be proven by Collier if it is to rely on the defense of fraud, Collier clearly disregarded said warning and did not prove said law. Gates, appellant, even notified Colliers in open court about the holding of this Court of Appeals in *Philip* v. *Macri*.

6— "This court has already indicated orally from the bench and now states again that the three ledgers (Exs. B13-A, B and C) on their face show that as of May 13, 1960, Gates began embezzling monies due Collier under the first contract and continued such embezzlements until Bennett discharged him as Collier's representative in Japan and took over the business on May 2, 1962. The two weeks' notice provided by the contract was obviously intended to apply to a voluntary termination of the contract—without involving any such gross and criminal breach thereof, as found here. By May 2, 1962, Bennett had before him clear and positive proof of Gates' fraud. Bennett's letter of discharge on May 2 and his acts immediately thereafter constituted ample notice to Gates that the contracts were forthwith terminated, and for what reason. Nork's actions in Australia, likewise gave the same notice. Under the factual circumstances, the two weeks' notice referred to in the contract had no application. The breach by Gates was so substantial and fundamental as to completely destroy the personalized foundation of the contracts and negated any possibility of Gates being permitted to continue to run Collier's Japan and Australian operations. Failure to terminate promptly after discovery of Gates' fraud would have waived the breach. All Collier-Gates contracts were terminated as of May 2, 1962." (Rec. 696-697)

1958, 9 C.C.A., 261 F. 2d 945, 75 ALR 2d 523 (hereafter discussed).

The above article in 50 ALR 2d 254 well discusses the law but it is also stated in 16 Am. Jur. 25 as follows:

> "The broad, uncontroverted rule is that the lex loci will govern as to all matters going to the basis of the right of action itself . . ." 16 Am. Jur. 2d 25.

See: *Central Vermont Ry. Co.* v. *White,* 238 U.S. 507, 59 L. Ed. 1433, 35 S. Ct. 865; *Cuba R. Co.* v. *Crosby,* 222 U.S. 473, 56 L. Ed. 274, 32 S. Ct. 132; *American Banana Co.* v. *United Fruit Co.,* 213 U.S. 347, 53 L. Ed. 826, 29 S. Ct. 511; *Scudder* v. *Union National Bank,* 91 U.S. 406, 23 L. Ed. 245; *Brown* v. *Ford Motor Co.,* (1931 C.C.A. 10, Okla.) 48 F. 2d 732; *Repsold* v. *New York Life Ins. Co.,* (1954, C.C.A. 7, Ill.) 216 F. 2d 479.

With relation to the problem of the proof of foreign laws Section 226-3 of the Revised Laws of Hawaii, 1955, provides as follows:

> "Sec. 226-3. Laws of foreign country. The law of a jurisdiction other than those referred to in section 226-1 . . . (which refers to laws of other states and territories of the United States) shall be an issue for the court, but shall not be subject to the foregoing provisions concerning judicial notice. (L. 1941, c. 110, s. 5; R. L. 1945, s. 9933.)"

Section 224-6 provides as follows:

> "Sec. 224-6. Uniform proof of statutes. Printed books or pamphlets purporting on their face to be the session or other statutes of any of the United States or the territories thereof, or of any foreign jurisdiction, and to have been printed and published by the authority

> of any such state, territory or foreign jurisdiction or proved to be commonly recognized in its courts, shall be received in the courts of the Territory as prima facie evidence of such statutes. (L. 1927, c. 109, s. 1; R. L. 1935, s. 3837; R. L. 1945, s. 9885.)"

On the problem of the proof of foreign laws in *Walton* v. *Arabian American Oil Co.*, (1956 C.C.A. 2) 233 F. 2d 541, a case in which plaintiff was injured in an auto accident in Arabia and with relation to the basis of recovery, the law of negligence in Arabia, the court held:

> "The general federal rule is that the law of a foreign country is a fact which must be proved. (Footnote cases: Black Diamond S. S. Corp. v. Robert Stewart & Sons, 336 U.S. 386, 396-397, 69 S. Ct. 622; Cuba R. Co. v. Crosby, 222 U.S. 473, 479, 32 S. Ct. 132; Liverpool and G. W. Steam Co. v. Phoenix Ins. Co., 129 U.S. 397. 9 S. Ct. 469."

This Ninth Circuit Court in *Philip* v. *Maeri*, (1958. C.C.A. 9) 261 F. 2d 945, 75 ALR 2d 523, a libel (defamation) action arising in Peru and governed by the law of Peru where the Peruvian law was not proven, held that:

> "In this diversity case we must apply Washington rules of conflicts of law. Klaxon Co. v. Stentor Electric Mfg. Co., 1941, 313 U.S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477; Sampson v. Channell, 1 Cir., 1940, 110 F. 2d 754, 128 ALR 394. Washington follows the general rule that the substantive law applicable to an alleged tort is the law of the place where the tort was committed. Restatement of the Law of Conflict of Laws, Secs. 377, 378. Richardson v. Pacific Power & Light Co., 1941, 11 Wash. 2d 288, 118 P. 2d 985; Mountain v. Price, 1944, 20 Wash. 2d 129, 146 P. 2d 327; Maag v. Voykovich,

1955, 46 Wash. 2d 302, 280 P. 2d 680. Here there is no question but that the alleged slander occurred in Peru, for the complaint alleges that the defamation was uttered, and Appellant's 'credit and reputation' injured, in Lima, Peru.

"We are thus faced with a situation where Appellant's cause of action arose in and should be governed by the law of Peru, but no Peruvian law is pleaded or proved. As seen above (Footnote 1, supra), there is a diversity of views on where this leaves a litigant. Does the cause of action fall for failure to allege an essential of the complaint, or does the forum assume the foreign law is the same as the law of the forum and apply it?

"We hold that the instant case is controlled by the principles set forth by Justice Holmes in Cuba R. Co. v. Crosby, 1912, 222 U.S. 473, 32 S. Ct. 132, 56 L. Ed. 274, 38 LRA NS 40. There, the Court was unwilling to assume that the law of Cuba (locus delicti) was the same as the common law. Thus, as the law of Cuba had not been pleaded or proved, the judgment entered for plaintiff in the trial court was reversed. Holmes pointed out that while it might be reasonable to presume that as between two common law countries, the common law of one was the same as that of another; that even as between two such countries there would be no such presumption where a statute was involved; i.e., a statute of one would not be presumed to be a statute of the other; and where both were not common law countries, the limits of the presumption would be narrower still.

"Where one country's judicial system is based on the Common Law and the other's on the Civil Law, both systems having been modified by statutory changes,

there is little to recommend the employment of a presumption that the law of one is the same as the law of the other.

"We do not presume that the law of defamation in Peru is the same as the law of defamation in the State of Washington."

Where one depends on a foreign law as a defense, if the foreign law is not proven, such a defense is unavailable to defendant. *Askanian* v. *Dostumian,* (1809) 174 Mass. 328, 54 N.E. 845; *Western U. Tel. Co.* v. *Way,* 83 Ala. 542, 4 So. 844.

And where one relies on a foreign law to recover as Colliers does in its counterclaim, upon failure of proof of foreign law, the case is dismissed. *Cuba R. Co.* v. *Crosby,* 222 S. Ct. 473, 32 S. Ct. 132; *Walton* v. *Arabian American Oil Co.,* 233 F. 2d 541. Defendant's counterclaim based on embezzlement, fraud and criminal breach should be forthwith dismissed. Its defense based on fraud should be denied. In these cases as well as in this Court's above quoted *Philip* v. *Macri* (*supra*), dismissal without a remand to the lower court was the final order. It isn't that Collier didn't know, but where it was warned of this court's decision in *Philip* v. *Macri,* Collier must take the consequences of its wilful disregard of the opinions of this court.

Without a defense of fraud, Colliers is clearly without a defense under Count Four of the amended complaint. (Rec. 365) Count Four covered Japanese Civilians and Schools (97B and 99B accounts).

Colliers has always been without a defense under Count Two (Australia 98B) and Count Three (Military 96B)

because Collier has admitted that Gates is not guilty of any alleged fraudulent conduct in Australia or under the military portion of the contracts.

V

Trial Court Erred in Finding That the Tokyo District Court Pro-Tem Decree Was Fraudulently Obtained

With relation to the Tokyo District Court order, the trial court found as quoted in the footnote 7.

The Tokyo District Court Order is admitted by Collier in its sworn answer ¶16 filed November 10, 1964. (Rec. 169) The gist of the order is stated in interrogatory ¶16. (Rec. 120) The order was received in evidence as Court's Exhibit A.

It is submitted that the trial court's finding of "fraudulent acts of embezzlement" in this respect is again based on the laws of Japan regarding embezzlement and the substantive law of fraud. The trial court's finding is therefore subject to the same objection that there was no proof of the Japanese law, as argued herein in Paragraph IV

7— ". . . The court finds the defendant's claim that the action in Japan was brought by Gates for the deliberate purpose of injuring Collier and was without any foundation in truth, in fact, or in law, is true. The court has reviewed the affidavit upon which Gates made his application for the restraining order and after hearing all of the evidence, including the testimony of Gates himself, the court finds that Gates' claims in his affidavit of June 8, 1962, that he was still the representative in Japan of Collier, that the board of directors had taken no action to discharge him as representative, and that Bennett misunderstood Gates' explanation of Japanese business on May 2, 1962, and that the board of directors did not issue a resolution to discharge Gates as a representative in Japan was false, and Gates knew it was false at the time he made the statement. At the time, Gates knew that the board of directors had already taken away all powers from him. The court finds that the Japanese court action was but part of Gates' wilful attempt to implement his fraudulent acts of embezzlement and to postpone the day of reckoning."

above. Said arguments are hereby incorporated by reference.

Furthermore it is elementary that "a judgment of a sister state cannot be challenged on the ground that it was obtained by false testimony or perjury." 55 ALR 2d 702. *Littlefield* v. *Payner,* 111 Kan. 201, 206 Pac. 114; *McDonald* v. *Drew,* 64 N.H. 547, 15 Atl. 148; *Crescent Hat Co.* v. *Chizik,* 223 N.C. 371, 26 S.E. 2d 871; *Hecht* v. *Alton,* (Texas) 59 S.W. 2d 428; *Allard* v. *La Plaia,* 147 Wash. 497, 266 Pac. 688.

It is further stated in said authority that, "Fraud in the transaction upon which the action is based is not fraud available as a defense against a judgment in that action when sued upon in a sister state." 55 ALR 2d 704. See: *Berman* v. *Diamond,* (1952 D.C.) 196 F. 2d 590; *Mahoney* v. *State Ins. Co.,* (1907) 133 Iowa 570, 110 N.W. 1041; *Lovejoy* v. *Ashworth,* 94 N.H. 8, 45 A. 2d 218.

The Tokyo Court order was entered on June 2, 1962 and it is still outstanding. (Rec. 120 and 169) The trial court's amended decision was filed on July 8, 1966. (Rec. 688) If it was fraudulently obtained Collier's should have voided the order in the Tokyo Court at least after this suit was started on July 9, 1964 and before trial was started on April 18, 1966. (Tr. 1)

Furthermore Collier's counterclaim nowhere alleged that the Tokyo Court Order was obtained by fraud. Collier's counterclaim only alleged that, "The value of the stock merchandise stolen, dishonestly retained and converted by plaintiff to his own use amounted to over $46,073." (Rec. 382) Gates brought out the fact of the issuance of the Tokyo Court Order in the trial of the cause

while questioning Mr. Nork (Tr. 179) to show that the sales by Gates of 251 sets after May 2, 1962, was under the Tokyo Court Order and it was proper. Colliers in its answer to the interrogatory regarding the order did not claim fraud in obtaining the order (Rec. 170) and admitted that it was Gates' Tokyo attorney who obtained said order. It is required by Rule 9(b) of the Federal Rules of Civil Procedure that "all averments of fraud or mistake, the circumstances constituting the fraud or mistake shall be stated with particularity." Colliers not only did not allege fraud but did not prove the circumstances surrounding the issuance of the order by the Toyko Court.

The court's finding that Gates misrepresented to the Tokyo court as follows:

> "The court has reviewed the affidavit upon which Gates made his application for the restraining order—that he was still representative in Japan of Collier, that the board of directors had taken no such action—and that the board of directors did not issue a resolution to discharge Gates as a representative in Japan was false and Gates knew it was false at the time he made the statement. At the time, Gates knew that the board of directors had already taken away all powers from him." (Rec. 707-708)

is not correct in that in said affidavit Gates was speaking only of the "*registered representative*" with the Japanese government. (Def's. Ex. G-1 in Evidence) A careful examination of the minutes of the meeting of April 26, 1962, does not reveal the revocation of such "registered representative" registration was ever authorized. A copy of said resolution appears on page 435 of the Record. It merely

removes Gates as vice president and supervisor of the Asiatic Division. Bennett in his letter of May 2, 1965, doesn't follow the corporate resolution. (Rec. 437) The claim of Colliers was subject to the many complicated defenses stated in this suit. The trial court's finding of "falsity" is not supported by the evidence in any manner.

Therefore the 251 sets of the encyclopedias and the other books sold after the issuance of the court order were sold under a valid and properly issued court order.

VI

Assuming That Appellant's Arguments in Paragraphs I, II, III, IV and V of This Brief Are Untenable, Collier's Evidence Was Insufficient to Sustain Court's Judgment on Counterclaim and Colliers Did Not Prove Any Defense of Fraud.

Assuming that Appellant's arguments in Paragraphs I, II, III, IV and V are untenable to this Court, Appellant still maintains that Colliers cannot recover on its counterclaims based on fraud and Colliers did not establish its defense of fraud:

A.—96B (Military), 98B (Australia) and 97B and 99B (Japanese Civilian and Schools) Were Divisible Portions of Contracts; Fraud If Any Concerned 97B Only.

At this point it will be helpful to this court to advance Appellant's arguments regarding divisibility of the Contracts of April, 1960 (Plf's. Ex. 1 in Evidence) and September, 1961. (Plf's. Ex. 2 in Evidence)

Prior to April 15, 1960, there were two separate contracts, Plaintiff's Ex. 5 (Japanese Civilian) and Ex. 4 (Military). Each was a separate operation in that Ex. 4 (Military) was a U.S. Dollar operation and Ex. 5 (Japanese Civilian) was a Japanese Yen operation. After April 15, 1960, these two operations were put into one contract (Plf's. Ex. 1 in Evidence) but because the two operations were still operated on different currencies, U.S. Dollars and Japanese Yen, they were kept separate operations. Accounts 96B and 97B were separate in sales personnel in that Japanese salesmen were used and the sales were in Japanese Yen (Def's. Ex. B-13 ABC in Evidence); the contract forms were entirely different (Plf's. Ex. 123 in Evidence); collections were handled separately and banked separately (Plf's. Ex. 9 in Evidence) (Plf's. Ex. 6 in Evidence); the military 96B was allowed an "Imprest Fund" while 97B did not have such a fund (Plf's. Ex. 9 in Evidence); 97B remittances were by way of licenses and drafts (Plf's. Exs. 11, 12, 14, 32 in Evidence); the accounting of the 97B and 96B was kept entirely separate (Plf's. Exs. 75, 108, 120, 121); 97B orders were filled from Tokyo but 96B orders were sent out parcel post to military personnel; 97B term orders were allowed a 12-month period of payment while 96B term orders were allowed 24-month period of payment (Plf's. Ex. 9 in Evidence) and Colliers did not pay any Japanese income taxes on its 96B military operation while it paid taxes on the 97B operations. (Plf's. Ex. 106 in Evidence) In other words the 97B and 96B accounts were as separate as the two separate operations under Plf's. Exs. 4 and 5 aforementioned.

Witness Nork testified as shown in footnote 8.

8— "Q. Paragraph 1 reads: 'Branch number assigned is No. 96.' That was not followed?

"A. That was not followed.

"Q. Why?

"A. Because we realized that we could not put all of this in one operation. That is to say, we could not mix up the military business together with the yen business. So it had to be separated. And we, therefore, had to create three different numbers, one for the schools and library sales, which was 99; the yen accounts were 97; and the military remained 96.

"So that is why this could not be followed.

"Q. Now, let's get to the school accounts. The school accounts were books sold to Japanese schools?

"A. Schools and libraries.

"Q. And these bore a special price?

"A. That's right.

"Q. But they were included with the Japanese sales in the monetary handling?

"A. In the banking.

"Q. In the banking?

"A. That's right, but not in the bookkeeping.

"Q. These were, Account No. 96 was the military account—right?

"A. Right.

"Q. What is the 'B' for?

"A. That means 'Branch.' We use that term in the States, on the Mainland, rather. 91-B would be Atlanta; 2-B is Chicago; 3, and so forth.

"Q. Now, with relation to 96, this was operated entirely separate and apart from the two Japanese yen accounts, the Japanese schools and Japanese civilians, separately?

"MR. BROWN: Your Honor, I object to the question on the ground that it isn't clear what he means by separate. Separate in what sense?

"THE COURT: Rephrase your question.

"Q. (By Mr. Kashiwa) For example, in the remittance of money, they were handled separately, weren't they?

"THE COURT: These three accounts, is that what you are asking?

"MR. KASHIWA: Yes.

"Q. (By Mr. Kashiwa) No. 96 was entirely separate from the civilian, the Japanese civilian?

"A. That's right." (Tr. 123)

With relation to the Australian contract the trial court found as follows:

> "Towards the end of 1961, Collier and Gates decided to open up a Collier branch in Australia, and did so in January, 1962. However, as to the Australian operation, it was agreed that Gates would act as an independent contractor and not as an employee of Collier and would be entitled to a 36% basic sales commission. Collier would open its own branch there to handle only the cash accounts receivable and the inventory of books, all sales to be under the control of Gates." (Rec. 692)

It was not only a separate contract, it was an entirely separate operation.

In 17 Am. Jur. 2d 758, with relation to divisible contracts, it is stated:

> "No formula has been devised which furnishes a test for determining in all cases what contracts are severable and what are entire. The primary criterion for determining the question is the intention of the parties as determined by a fair construction of the terms and provisions of the contract itself, by the subject matter to which it has reference, and by the circumstances of the particular transaction giving rise to the question. Whether a contract is entire or divisible cannot be determined by a single term, phrase, or sentence, even though it is broad enough to include such meaning, unless, throughout the whole agreement and from the surrounding circumstances, it definitely appears either that it was or that it was not the intention of the parties that the contract should be entire and indivisible. *If, in this respect, the parties themselves have placed a certain construction on the contract, that is to be con-*

sidered, and acts of the parties in treating the contract as entire or severable have an important bearing on its construction. A factor in determining whether a contract is entire or severable is whether the parties reached an agreement regarding the various items as a whole or whether the agreement was reached by regarding each item as a unit. A contract to do several things at several times is divisible in its nature if there is no manifestation of a contrary intent."

and at page 760, it is further stated:

"In construing a contract to determine whether it is entire or severable, many of the courts have regarded the singleness or apportionability of the consideration as an important test—that is, if the consideration is single, the contract is entire, but if the consideration is expressly or by necessary implication apportioned, the contract is severable. Thus, where several things are to be done under a contract, and the money consideration to be paid is apportioned to each of the items, the contract is ordinarily regarded as severable."

See: *Pollak* v. *Brush Elect. Asso.*, 128 U.S. 446, 9 S. Ct. 119; *Trainman* v. *Pappaport*, (C.C.A. 3) 41 F. 2d 336, 71 ALR 475; *Hutchison* v. *New York & P. Co.*, (C.C.A. 4) 229 Fed. 510.

It is submitted that 96-B (Military), 98-B (Australia) and 97-B and 99-B (Japanese Civilian and Schools) were all divisible portions. In fact the Australian contract was a separate contract as the court held.

The fact that Appellant was an independent contractor further adds to the above argument of divisibility. Appellant argued below[9] that Appellant was an independent contractor as to all these three segments of the contract. 96B, 97B and 98B.

In 2 C.J.S. 1027 it is stated:

> "An independent contractor and an agent are not always easy to distinguish, and there is no uniform criterion by which they may be differentiated. Generally, however, the relations are distinguished by the extent of the control which the employer exercises over the employee in the manner in which he performs his work. Where the will of the employer is represented only in the result, and not in the means by which

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9— "The Collier-Gates & Son Corporation contract of May 1, 1959 (Plf's. Ex. 4 in Evidence) in describing the relationship of the parties in its military books sales contract specifically provided as follows:

> '16. *Nothing in this agreement shall be deemed to constitute either Gates or any of its agents or employees as an agent, employee or representative of Collier.*'

In Colliers 'Procedure for Opening Tokyo Branch, Japan' written by S. J. Nork it is stated:

> '*Salesmen—Independent Contractors.* The law governing free lance is basically very similar to that in the United States in that a free lance salesman dealing strictly on a commission will be considered an *independent contractor,* and the company would not be liable to third parties as employer.'

In the April, 1960, and September, 1961, contracts paragraph 8 provided as follows:

> '8. All expenses incurred in connection with the operation of the Japan division of Collier, including the compensation of sales personnel, clerical personnel, office rent, warehouse and storage charges, shall be payable by Gates.
>
> 'In the event Collier shall be charged with or become liable for any of the operating expenses of the Japan division of Collier as hereinabove set forth, it shall have the right to deduct any moneys paid by it on account thereof from any moneys that may be payable by Collier to Gates under this agreement.' " (Rec. 516)

> it is accomplished, and the employer retains no control over the employee as to the manner or means of accomplishing the desired result, the employee is an independent contractor, and he, and not his employer, is responsible for his own acts and contracts, and the relation is not changed by the employer's reservation of the right of supervision and approval."

See: *United States* v. *Silk*, 331 U.S. 704; *Bond* v. *Harrell*, 13 Wisc. 2d 369, 108 N.W. 2d 552; *Cannon* v. *Time, Inc.*, 115 F. 2d 423; 75 ALR 2d 725; 126 ALR 1120; 27 Am. Jur. 485 and 98 ALR 2d 336.

Under these authorities Gates was clearly an independent contractor.

There being three divisible portions to the contract, and Colliers having admitted that the alleged fraud, if any, concerned only 97B portion of the contract, it is submitted that Colliers did not have a defense to plaintiff's suit on the 96B (military) and 98B (Australia) portion of the contract. These contracts were only terminated by the notice of termination given after the September 28, 1962, meeting of Collier's Board of Directors (Plf's. Ex. 89 in Evidence) two weeks prior to October 16, 1962. Appellant's figures presented in Exhibit CC in appendix of this brief are based on a termination as of October 16, 1962.

As for the 97B portions of the contract, Appellant maintains that Colliers failed in its proof in the particulars listed in Subparagraphs B, C, D and E to follow.

B.—Collier's Exhibits B-13A, B and C Were Only Book Entries; No Conversion Was Proven, Therefore No Action in Fraud May Be Maintained.

This argument is directed to the 97B claim only in that Colliers admits that the alleged fraud was only in the 97B portion.

As heretofore argued, the Criminal Statute of Japan on Embezzlement was not introduced in evidence. There being no embezzlement statute proven, Colliers completely failed in its proof of conversion of any funds by Appellant. Appellant came into possession of the funds lawfully after the sale of the books with full consent of Colliers. It will be shown that Gates did with said funds exactly what he was ordered to do in writing by Collier. So where is the conversion of funds?

First of all, as it is well stated in 26 Am. Jur. 2d 609:

> "The mere making of false entries in books of accounts is not sufficient evidence of an act of conversion constituent to the crime of embezzlement. . . ."

And as stated in 17(A) C.J.S., 494, Section 467:

> "As a general rule, forfeitures are not favored either in law or in equity, and before a forfeiture will be enforced the right thereto must clearly appear to have arisen. The party insisting on the forfeiture must comply strictly with all contract requirements and with conditions authorizing the forfeiture. So where forfeiture is dependent on the making of a demand and failure to comply with the demand, the failure to make a proper, specific, and reasonable demand is fatal to the enforcement of the forfeiture by a court of law or equity. *Also, the party claiming the benefit of a contract provision for forfeiture must*

not be himself in default, and he must be free from blame for the other party's default. A party will not be permitted to take advantage of his own independent act to work a forfeiture of his own contract. A forfeiture cannot be had on grounds other than those specified in the contract."

It is important to note that Colliers did not supply Gates with any funds with which to start the Tokyo office. But out of the sale of each set of books for $269.50, Gates was allowed his 34% to pay his salespeople and send $172.50 to New York. If he gave a 5% discount to the customer, there was nothing left for him. Plaintiff's Ex. 111 in Evidence well explains this on a 100 set basis. The arithmetic quoted in said Exhibit 111 is as follows:

Total selling value	$26,950.00
34 % commission	–8,483.00
	$18,467.00
$172.50 per set remittance	–17,250.00
	$ 1,217.00
Discount	1,200.00
Left over in Tokyo	$ 17.00

The above letter from Gates to witness Nork was dated October 16, 1960, so Colliers well knew that Gates couldn't continue the Tokyo office because there were term sales as well as cash sales unless he utilized the following two written authorizations given by Collier:

1) "Terms: *Full amount of invoice* covering cost of books, payable in U.S. Dollars *in twelve (12) equal monthly installments*, starting thirty (30) days from the time this shipment of books has cleared through customs into Japan." (Rec. 130, 132) (Plf's. Exs. 24, 26 in Evidence) (Emphasis ours) (This was also repeated in the Japanese Import Licenses).

2) "After the Tokyo Bank Account has sufficient yen deposits, the salespeople paid on yen accounts will be paid in yen from this account (Tokyo yen account)." Plf's. Ex. 9 in Evidence at page 3.

The first authorization (1) permitted him to remit in 12 equal monthly installments the full amount of the invoices. No remittance was required on a set-for-set basis. So if there were a cash sale, payment therefor may be made in 12 equal installments so that under (2) above the 34% commission ($84.83) under term yen sales where the down payment was for example only $10 may be paid because Colliers did not supply Appellant with an "Imprest fund" for Tokyo yen sales. (1) above supplied the necessary "slack" and (2) contemplated such a "slack" because as stated in Plaintiff's Ex. 111 in Evidence nothing remained out of each $269.50 after the 34% Commission was paid, the $172.50 remittance sent to New York and a discount given.

In other words the "slack" was provided for in writing by Colliers. It is submitted that where Colliers consented to the "slack" in writing, it cannot accuse Gates of fraud because it is elementary that there is no conversion when one consents.

The evidence in this case further shows the Japanese yen remittances (Rec. 139-146) from appellant in Tokyo

to Colliers in New York converted into U.S. Dollars as shown in footnote 10.

In other words in accordance with the invoices and the import licenses the amounts due were sent in accordance with (1) abovequoted. The sums were sent in lump sums, without earmarking the amounts remitted set by set. Collier was therefore concerned with the total remittance and this was to be on a 12-month equal payment basis. Each of the invoices were met under (1) above exactly in accordance with (1). Certainly there was a "slack" when cash sales remittances were not sent immediately but when Colliers agreed to 12 months equal payment of its total monies amounts, Colliers cannot object.

10—

July 1960	$1,000
September 1960	6,000
October 1960	5,500
November 1960	5,000
December 1960	9,500
January 1961	$16,500
February 1961	10,500
March 1961	17,500
April 1961	14,000
May 1961	15,500
June 1961	17,500
July 1961	18,000
August 1961	9,500
September 1961	11,250
October 1961	10,500
November 1961	10,000
December 1961	1,000
January 1962	$5,500
February 1962	13,200
March 1962	7,182.50
Total	$204,632.50

And payments to Gates of the 34% ($84.83) commission under term yen sales where down payments were less than $84.83 under (2) above, were certainly with Collier's written consent.

Payment for Japanese taxes were also made out of the already drained Tokyo yen account. (Plf's. Ex. 106 in Evidence) Transportation Expenses for the Yokohama to Tokyo haul of books were also paid. (Plf's. Ex. 115 in Evidence) Colliers permitted payment of Gates airline tickets from said account. (Plf's. Ex. 84 in Evidence) Colliers knew that these excessive drains on the yen accounts also existed. How was Gates to pay these amounts when Colliers itself knew that the Tokyo Yen Account existed by reason of the "slack." Colliers gave Gates authority under (1) above quoted and he used it.

And finally Gates was appointed to operate the Tokyo office with a broad written general power of attorney. (Plf's. Ex. 82 in Evidence) In the absence of an embezzlement statute, one given such a broad power of attorney can never be held for conversion of funds where he is directed by other documents to do as he did.

Furthermore Collier's case is further weakened in that there was debtor and creditor relationship between Gates and Collier. The trial court found that there was no debtor-creditor relationship between Colliers and Gates but it is submitted that such finding is completely contrary to the evidence.

Witness Simon J. Nork testified as shown in the footnote 11.

For the 96B military accounts there was an "impress fund" but for the 97B Japanese Civilian accounts no impress fund was provided. In other words on a term sale in Japanese yen, where there was a down payment of the yen equivalent of $10.00, Colliers immediately owed Gates ($84.83–10.00) $74.83. There were 1,404 term sales or a total of $119,101.32 ($84.83 x 1,404) was involved. So

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11—"Q. Now, will you refer to paragraph 5?

"THE COURT: Of Exhibit 1?

"MR. KASHIWA: Yes, paragraph 5.

"Q. (Continuing) Paragraph 5 with relation to the 34 per cent commission. All right, now, if there was a $269.00 order of encyclopedias, and there was a $10.00 down payment, the first payment, the first payment on that set, what was due Gates?

"A. The difference between the $10.00 that he retained and the 34 percent that he was supposed to receive, which will depend—

"Q. Assuming that it is $269.50, the 34 percent was about $84.00, am I right?

"A. Yes.

"Q. And so with $10.00 down, there would be about $74.00 owing to Gates?

"A. Correct.

"Q. That is the way it was operated?

"A. That is the way it is operated." (Tr. 89-90).

And he further stated:

"Q. Yes. And also you did testify that, for example, if there was a term sale with less than 34 percent payment, for example, 10 percent payment, then Collier would owe Gates the balance?

"A. That's right.

"Q. In other words, there was a lot of debit and credit going on?

"A. Correct. That will be explained by our accountant.

"Q. This was quite complicated, am I right?

"A. Correct." (Tr. 149-150).

these term sales in Yen immediately created a creditor-debtor relationship.

A further debtor-creditor relationship was created in New York in that with relation to the $172.50 sent to New York for each set sold under the import licenses the $172.50 was made up of the following:

Collier's Right	
40.5%	$118.00
Gates' Rights	
12.5%	34.00
7%	17.00
1%	3.00
	$172.00

In other words some of Gates' own funds were sent to New York. (Tr. 386) With the debtor-creditor relationship in existence there was no embezzlement proven. Neither was fraud proven.

In 18 Am. Jur. 580, it is stated:

> "Sec. 20. Debtor and Creditor Relation.—Generally, when dealings between two persons create a relation of debtor and creditor, a failure of one of the parties to pay over money does not constitute the crime of embezzlement. For example, a laundry agent who is paid by commissions and who is charged with the entire amount of laundry work done stands in the relation of debtor to the laundry company. He holds money collected in such capacity and cannot be convicted of embezzlement. Similarly, a contract for the sale of money creates a relation of debtor and creditor, and not one of trust, so that a failure to pay over the money does not constitute embezzlement.

> "Ordinarily, whether the relation of debtor and creditor exists depends upon the facts of the particular case. Where a principal acquiesces in his agent's practice of depositing rents collected, on his general account, and of treating the deposits as his own, such a course of dealings may divest the principal of his specific property in the deposits and establish the relation of creditor and debtor between him and his agent."

See also: *MacGray* v. *Bennett,* 250 N.C. 707, 110 S.E. 2d 324; 26 Am. Jur. 2d 567; *U. S.* v. *Mason,* 218 U.S. 517, 31 S. Ct. 28.

It is submitted that therefore under the circumstances in this case there was no conversion proven. There was no fraud proven.

C.—Colliers Failed to Prove Alleged Fraud Proximately Caused Pecuniary Losses.

One of the most elementary rules of law in a civil action for damages based on fraud is that the complainant must prove "actual pecuniary loss" suffered as a proximate cause of the alleged fraud.

In the recent case of *Toho Bussan Kaisha, Ltd.* v. *American President Lines, Ltd.,* (1959, C.C.A. 2, N.Y.) 265 F. 2d 418, wherein the court held:

> "(3, 4) The New York decisions make it plain that the recovery allowable for fraud is not punitive in nature. *The plaintiff is entitled to be indemnified only for actual pecuniary loss.* Hanlon v. Macfadden Publications, 1951, 302 N.Y. 502, 511, 99 N.E. 2d 546, 24 ALR 2d 733; Ross v. Preston, 1944, 292 N.Y. 433, 436, 55 N.E. 2d 490; Sager v. Friedman, 1936, 270 N.Y. 472, 480-481, 1 N.E. 2d 971; see also Reno v. Bull,

1919, 226 N.Y. 546, 553, 14 N.E. 144 (even possible profits may not be recovered). We therefore find no merit in plaintiff's principal contention. (Emphasis ours)

"(5) The next question raised by this appeal is who has the burden of establishing plaintiff's actual pecuniary loss. This question is also governed by the law of New York. Palmer v. Hoffman, 1943, 318 U.S. 109, 63 S. Ct. 477, 87 L. Ed. 645; Sampson v. Channell, 1 Cir., 1940, 110 F. 2d 754, 128 ALR 394, certiorari denied 310 U.S. 650, 60 S. Ct. 1099, 84 L. Ed. 1415.

"(6) Judge Dimock dismissed the plaintiff's action at the close of its case on the ground that it had failed to prove damages. We think Judge Dimock was correct. Under the law of New York plaintiff has the burden of establishing that the amount it paid out on the ten false bills exceeded any sum or sums which it may have received on account of this transaction. Merely proving that the money was paid out in reliance on false bills of lading is only part of the story. Sager v. Friedman, supra, 270 N.Y. at page 482, 1 N.E. 2d at page 974; Deutsch v. Roy, 1st Dept. 1934, 239 App. Div. 714, 268 N.Y.S. 606, affirmed 1935, 269 N.Y. 508, 199 N.E. 510; Woolson v. Waite, 158 Wisc. 764, 768, 286 N.Y.S. 619, affirmed 4th Dept. 1936, 247 App. Div. 855, 286 N.Y.S. 624. Here the record does not show that the plaintiff suffered any actual pecuniary loss."

In *Automatic Truck Loader Corporation* v. *City of New York*, (1945) 57 N.Y.S. 2d 295, the court held:

"(15) There is no basis for awarding to the plaintiffs what they would have obtained if the representations were true. Reno v. Bull, 226 N.Y. 546, 124

> N.E. 144, was an action brought by the purchaser of stock for damages resulting from false representations by the seller. The court said, per McLaughlin, J., 226 N.Y. at pages 552, 553. 124 N.E. at page 146: 'The rule as to the measure of damages is not the one to be applied. The court said to the jury that if the plaintiff were entitled to recover, then he should be awarded "the difference between the value of the stock at the time it was sold to him * * * and the value of the stock as it would have been at that time if the representations were true." The purpose of an action for deceit is to indemnify the party injured. *All elements of profit are excluded. The true measure of damage is indemnity for the actual pecuniary loss sustained* as the direct result of the wrong.'" (Emphasis ours)

The question therefore is whether Colliers proved "*actual pecuniary loss sustained as a direct result of the wrong.*"

First of all the alleged fraud was only in the 97B (Japan Civilian) phase of the contracts. No fraud of any nature was proven in the 99B (Japan schools), 96B (Military) and 98B (Australian) phases of the contracts. Therefore without any fraud in these three phases (99B, 96B and 98B) of the contracts there can be no damages caused by fraud. The trial court erred in allowing damages on the counterclaim to Colliers under the 99B and 96B phases of the contracts. The trial court found as follows:

> "His calculations (Collier's Accountant, Rabinowitz) made on a basis most favorable to Gates, showed that out of a gross sales of over $1,069.549 Gates' liability under the 12.5% clause for 96B (military) and 97B (Japan Civilian) accounts, as well as the 10% liability clause on the 99B Japan schools accounts was

$185,822. Only the Australian accounts reflected a credit due Gates on term business. As indicated by the calculations of Rabinowitz, Gates still owes Collier $169,013 under the contracts."

The figure $169,013 broken down (Def's. Ex. R. 48 in Evid.) was as follows:

96B (Military)	$54,366
99B (Japan Schools)	27,052
97B (Japan Civilians)	90,150
98B (Australia) (this was a plus figure)	(2,555)

It is submitted that the court erred in allowing for 96B $54,366 and for 99B $27,052. The 98B figure of only $2,555, although a plus figure was in error in that it should have been plus $351,699.83. (See Exhibit CC, appendix herein.)

As for the 97B (Japan Civilian) figure of $90,150 the trial court was in complete error in that only losses proximately caused by the alleged fraud may be assessed against Appellant. The alleged fraud committed by Collier's Exhibit B-13 A, B and C (as shown by Argument B above) did not cause any loss or damage to Colliers. The whole plan of the Tokyo office set up, started without any funds and requiring remittance of practically all remaining out of the $269.50 gross sales price, after the 34% commission is paid and 5% commission given revolved about these two clauses:

1) "Terms: Full amount of invoice covering cost of books payable in U.S. Dollars in twelve (12) equal monthly installments, starting thirty (30) days from time this shipment of books has cleared through customs into Japan." (Rec. 130, 132)

2) "After the Tokyo Bank Account has sufficient yen deposits. the sales people paid on yen accounts will be paid in yen from this account." (Plt's. Ex. 9 in Evidence)

As argued fully in Paragraph B above Colliers agreed by (1) above to a "slack" in the remittance of funds and Colliers agreed by (2) that said "slacked" funds may be used to pay the term yen sale 34% commission which Colliers owed the salesman if the down payment was only $10.00 for example. Nothing was lost by Colliers by the "slack." It even consented to the "slack." And payment of what Colliers owed already certainly was not a "pecuniary loss." Colliers wanted the salesman to be paid by using funds caused by the "slack." Colliers consented in writing by (1) and (2) above. How could it represent to this court that any pecuniary losses were incurred?

Being unable to prove a loss proximately caused by the alleged fraud, if any, Colliers shifted in midstream of its case to proving contractual liability under the 12½% and 10% clauses of Plaintiff's Exhibits 1 and 2 in Evidence. As it will be shown in Paragraph D to follow, Colliers is precluded from doing this in that it elected to sue in tort and it may not now seek to restore a rescinded contract and bring to life what is considered "annihilated."

D.—Colliers Rescinded Its Contract of September, 1961 and Cannot Sue for Future Liabilities to Arise under the Said Contract.

As for the April 15, 1960, contract (Plf's. Ex. 1 in Evidence) the evidence is that Colliers was fully paid for in its 97B portion in that Colliers paid the 12½% commission thereunder in the sum of $18,834.24. (Tr. 386)

The first payment was for $9,353.25 for sales numbers 97B 1-303. (Tr. 386) The last payment is evidenced by Plaintiff's Ex. 93 in Evidence showing payment of $9,480.99 for accounts 304 to 607. Plaintiff's Ex. 75 in Evidence, a document prepared by Colliers, shows only 607 sales by P. F. Collier & Son Corp. It shows no loss to P. F. Collier & Son Corp. (See also Plf's. Ex. 121 in Evidence) so a full 12½% was paid. It is submitted that since there was no loss, no action for fraud could be maintained on said contract of April 15, 1960. *Toho Bussan Kaisha, Ltd.* v. *American President Lines,* (1959, C.C.A. 2) 265 F. 2d 418.

As for the September, 1961, contract (Plf's. Ex. 2 in Evidence) Colliers chose to terminate the contract by a written notice (assuming for this argument that it was a valid notice). Colliers thereby rescinded the contract and it cannot again enforce any liabilities arising under the contract subsequent to May 2, 1962. Election to sue in tort for the alleged wrong done under Colliers' Exhibit B-13 A, B and C covering the period May, 1960 to May, 1962. also meant a rescission of the contract of September, 1961. The contract is "annihilated" by the rescission and Colliers may not enforce any rights under the contract under any assumption that the contract was in existence.

In 25 Am. Jur. 2d 674 under the topic "Election of Remedies," with relation to the effect of election it is stated:

> "Where a party, with knowledge of the facts, and in the absence of fraud or imposition makes an election between inconsistent remedies, and the one chosen by him is not a mistaken remedy, his election is final,

conclusive and irrevocable, and constitutes an absolute bar to any action, suit, or proceeding inconsistent with that asserted by the election."

United States v. *Oregon Lumber Co.,* (On Certificate to Sup. Ct. from 9 C.C.A.) 260 U.S. 290, 43 S. Ct. 100;

Karapetian v. *Carolan,* 83 Cal. App. 2d 344, 188 P. 2d 809, 1 ALR 2d 1075;

Holscher v. *Ferry,* 131 Colo. 190, 280 P. 2d 655;

Davidson v. *McKown,* 157 Kan. 217, 139 P. 2d 424, 6 ALR 2d 1;

Labor Hall Ass'n v. *Danielsen,* 24 Wash. 2d 75, 163 P. 2d 167, 161 ALR 1079;

Boeing Airplane Co. v. *Aeronautical Industrial Dist. Lodge,* (D.C. Wash.) 91 F. Supp. 596, aff'd (9 C.C.A.) 188 F. 2d 356, cert. den. 342 U.S. 851, 72 S. Ct. 39;

Bankers Trust Co. v. *Pacific Employers Inc. Co.,* (C.C. A. 9, Nev.) 282 F. 2d 106, cert. den. 368 U.S. 822, 82 S. Ct. 41;

White Oak Coal Co. v. *United States,* (C.C.A. 4) 15 F. 2d 474, cert. den. 273 U.S. 756, 47 S. Ct. 459.

The trial court in its original decision of June 21, 1946, well aware of this rule of rescission held at page 10 of said decision as follows:

"The breach by Gates was so substantial and fundamental as to completely negate and destroy the objects of the contract. Failure to *rescind* promptly after discovery of plaintiff's fraud would have waived the breach. The contracts were *rescinded* and terminated as of May 2, 1962." (Rec. 635)

The court in its amended decision after Appellant filed its motion for new trial (Rec. 658) changed the above paragraph so that the first "rescind" was changed to "terminate" and the second rescinded was eliminated (Rec. 697). The trial court attempted to correct its error but it is submitted that "termination" is rescission under the circumstances of this case. This Court of Appeals in *Boeing Airplane Co. v. Aeronautical Industrial District Lodge*, (9 C.C.A., 1951) 188 F. 2d 357 held:

> "We have examined the entire record and are satisfied that the learned district judge correctly concluded, in the light of the terms of the contract and all the circumstances of the case that at the time immediately after the strike began when Boeing elected to terminate the contract the union had been guilty of a material breach which fell short of abandonment or total repudiation of the contract. *The power of termination which accuses the wronged party as a result of such a breach and was exercised by Boeing in this case is a right of rescission* which leaves neither party with any basis thereafter to complain of the conduct of the other as a breach of the contract." (Emphasis ours)

The Ninth Circuit Court completely approved the lower court's opinion in 91 F. Supp. 596, 609. The lower court's opinion is well written.

It is submitted that by the very nature of the September, 1961, contract, Plaintiff's Exhibit 2 in Evidence, under paragraph 10 thereof in which Gates guaranteed the collectability of term sales (the 12½% and 10% clause) the collectability of the accounts was to be determined for the 97B accounts in the following manner:

> "It was contemplated by both parties that there might be losses on account of bad accounts—Collier expecting a loss of 12.5% on the total amount of accepted orders. In order to induce good, collectible business, on 24-month contracts a monthly analysis would be made 30 months from the month in which the business was reported, and on a 12-month contract—15 months. If a contract was not paid in full at the end of either 30 or 15 months, it was classified as a loss. If the losses were below 12.5%, Gates was to get the difference between the 12.5% and the actual percentage loss ratio incurred. If the actual loss ratio exceeded 12.5%, Gates was to pay Collier the difference between 12.5% and the actual percentage of loss over that figure." (Rec. 627-628)

In May, 1962, only eight months of the allowed 15 months period had passed under the 97B contract and only eight months of the allowed 30 months period had passed under the 96B contract. Because of this 12½% guarantee clause the contract was not one forthwith terminable. Colliers was bound to allow the respective 15 months period or the 30 months period to go by before determining the guaranteed amount. Colliers had a right to do this but by its early termination, it rescinded the contract and Appellant cannot be held liable for obligations to arise in the future under the rescinded contract.

The trial court followed witness Rabinowitz's testimony and held as follows:

> "As indicated above, defendant had an exhaustive study of all of the Gates' Japan and Australian accounts made by Rabinowitz. In his calculations, Rabinowitz gave Gates full credit for all sales up to and

including May 2, as if Gates had not committed fraud and embezzlement. *His calculations, made on a basis most favorable to Gates, showed that out of gross sales of over $1,069,549, Gates liability under the 12.5% clause for 96-B Military and 97-B-Japan Civilian accounts, as well as the 10% liability clause on 99-B Japan schools accounts was $185,822.* Only the Australian accounts reflected a credit due Gates on term business. As indicated by the calculations of Rabinowitz, Gates still owes Collier $169,013 under the contracts."

In other words the trial court did the very thing this court prohibited in the Boeing case. One cannot terminate a contract of the nature in this case and later say that it did not rescind the contract.

The trial court erred in deciding that there was $169,013 due under the 12½% and 10% clause. The figure $169,013 is based on Collier's Ex. R-48 in Evidence, Plate #3. It clearly shows that the 12½% and 10% clause was used. Furthermore even if the clause is used there was no "loss" to Colliers proven as required under said 12½% and the 10% clause. See Exhibit EE page 79 hereof.

VII

Allowance of Attorney's Fees and Travel Expense Not Proper Allowances

It is submitted that if Appellant prevails in his arguments in Paragraphs I, II, III, IV, V, and VI of this brief Colliers will not be able to recover anything. To the contrary Appellant is entitled to recovery.

It is too elementary to submit authorities that one who hires attorneys and spends travel money for a futile purpose, an ill advised counter suit and an unfounded de-

fense of fraud cannot recover said expenses back. The amounts of $25,000 for attorney's fees and $11,011.99 for travel expenses, included in the Judgment below should be forthwith deducted.

CONCLUSION

It is submitted that the trial court erred in finding and concluding that Appellant is not entitled to recover anything and awarding Colliers judgment in the sum of $306,676.25 in that on the evidence and the law, judgment should have been in favor of Appellant in the sum of $422,804.98 and the counterclaim of Colliers should have been dismissed.

Dated: ....., 1966.

Respectfully submitted,

KASHIWA AND KASHIWA
by SHIRO KASHIWA
Attorneys for Appellant

CERTIFICATION OF CONFORMITY

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

KASHIWA & KASHIWA

By .....
SHIRO KASHIWA
Attorney for Appellant

APPENDIX OF EXHIBITS

PLAINTIFF'S EXHIBITS:

No.	Description	Trans. pages For Ident.	Trans. pages In Evidence
1	Agreement between Gates & Collier, 4/15/60		67
2	Agreement between Gates & Collier, 9/15/61		67
3	Assignment & Agreement P. F. Collier & Son Corp. & P. F. Collier Inc., 4/1/61		67
4	Agreement between P. F. Collier & Son Corp. & R. E. Gates & Son Co., 5/1/59 re: Solicitation of orders for various publications—Military		67, 239.
5	Agreement between P. F. Collier & Son Corp. & R. E. Gates & Son Co. re: Exclusive subscription selling rights for Collier's encycs.—Japan civilians		67, 239.
6	Changes affecting Tokyo 96B accts. receivable (Military)		67
7	Ltr., Crowell-Collier to R. E. Gates, 5/12/59		67
8	Power of Attorney—P. F. Collier Inc. to Ronald E. Gates, 3/14/61		67
9	Procedure for Opening Tokyo Branch, 4/1/60		67
25	P. F. Collier invoice, 6/20/60		101
14	Sight draft to P. F. Collier, $500, 7/19/60		102
15	Sight draft to P. F. Collier, $2,000 1/9/61		102
17	Copy ltr., Nork to Gates, 11/9/61		102
23	Invoice, Collier to Gates, 1/19/60		102

PLAINTIFF'S EXHIBITS:

No.	Description	Trans. pages For Ident.	Trans. pages In Evidence
24	Invoice, Collier to Gates, 5/5/60		102
26	Invoice, Collier to Gates, 7/23/60		102
30	Ltr., Nork to Gates, 3/9/61		102
13	Computation (Collier Rights)		104
76	Invoice, Collier to Gates, 4/2/54		72
43	Import License, 3/5/62		154
53	Ltr., Ryan to Gates, 10/30/53		154
54	Ltr., International Expediters to Gates, 3/1/60		154
37	Power of Attorney, Collier to Gates, 12/7/61		190
28	Ltr., Nork to Gates, 11/30/61		192
46	N. Z. & Australia Bank Power of Attorney, Collier to Gates & Nicolle, 1/4/62		192
11	List of drafts, Gates & Son to Collier & Son, 7/19/60 to 1/13/61		235
12	List of drafts, Gates to Collier, 1/9/61—4/9/62		235
77	Map of Tokyo Hiratsuka Office Bldg.		268
75	Financial Analysis, U.S. Dollar figures, Orders Obtained by Gates under Contracts		300
78	Ltr., Collier to Gates, 11/10/60, & encls.		301
79	Ltr., Johnson to Gates, 8/24/60		301
80	Invoices, Collier to Gates, 5/1/59 and 3/11/60		301
81	Power of Attorney, Collier to Gates 8/8/61		301
82	Power of Attorney, Collier to Gates 3/14/61		301

PLAINTIFF'S EXHIBITS:

No.	Description	Trans. pages For Ident.	Trans. pages In Evidence
83	Invoices, Collier (N.Y.) to Collier (Japan) 4/14/61, 11/8/61, 6/19/61 and 9/27/60		301
84	Ltr., Collier to Gates, 8/26/60		301
85	Ltr., Kelly to Gates, 8/23/60 & encl.		301
86	Sydney Branch, Commission Receipt, 4/4/62		301
87	Memo, Johnson to Kelly, 10/10/61		301
88	Ltr., American International Underwriters to Nork, 4/26/62		301
89	Minutes, Special Meeting Board of Directors of P. F. Collier, and Certification		301
90	Computation (Formerly Ex. FF)	355	
91	Computation (Formerly Ex. CC)—Details of Business Transacted ending 10/16/62	355	
92	Classification of Gates' & Collier's rights, Rev. 3/26/65	366	
94	Computation (Formerly Ex. EE)	406	
93	Commission Receipt, 12/21/61		427
95	Answers to Interrogatories 14, 18, 31, 32, 33 & 60 by Nork on 2/10/65	442	450
96	Computation sheet (marked Ex. Q)	450	
97	Computation sheet (marked Ex. P)	451	
98	Pamphlet "The Foreign Exchange and Foreign Trade Control Law (Japan), Law No. 288, Dec. 1, 1949"	459	460
99	The Commercial Code of Japan--1963	462	462
100	Civil Code of Japan	496	496

PLAINTIFF'S EXHIBITS:

No.	Description	Trans. pages For Ident.	Trans. pages In Evidence
32	Copies of dollar draft purchased from First National City Bank of N.Y., Tokyo Branch		566
101	Affidavit of Tsuyoshi Saito (English Translation)	631	632
102	Page of signatures written by T. Saito	643	643
103	Certificate of Registration	687	690
104	Letter to Chief Customs Officer, Yokohama, 5/6/60	692	695
105	Letter from Nork to Gates, 7/11/60	779	
106	Communications from Collier file re: taxes	823	826
107	(Re-marked Defendant's R-1 at pp 860)—Summary prepared by A. Rabinowitz	829	
108	Computation of Commissions paid to Gates—(Plate 2)	895	945
109	P. F. Collier correspondence—8/15/61 & 9/5/61	914	917
118	Letter, Nork to Gates, 3/7/61	914	926
110	Letter, Nork to Gates, 9/21/61; memo from Nork to Kelly	914	917
111	Letter, Gates to Nork, 10/25/60	914	942
112	Letter, Nork to Kelly, 3/27/61	914	918
113	Letter, Nork to Gates re: Home Office loan, 4/26/61	914	954
114	Letter	914	
115	Letters, Nork to Kelly, between 2/21/61 and 7/25/61	914	922
116	Letter, Nork to Gates, 5/5/60 & encl.	914	927

PLAINTIFF'S EXHIBITS:

No.	Description	Trans. pages For Ident.	In Evidence
117	Letters, Nork to Kelly, 2/21/61 and 6/12/61	914	922
119	Computation	937	
120	Computation—Actual Bad Debts Rates over 12-1/2% Base, 96B, 4/60—10/62	937	966
121	Computation of 12-1/2% & 10% Commission on 97B & 99B accounts	939	966
122	Letter, Marrack to Kashiwa, 12/16/65	968	
123	Contract form between P. F. Collier Inc. & purchaser of Collier's encyc.	975	982
124	Contract form between R. E. Gates & Son Co., Ltd., & purchaser of Collier's encyc.	976	
125	Contract between P. F. Collier Inc. & Antonio I. Uugaata, Guam, M.I.	976	
126	Letter, Nork to Kelly, 6/15/60	983	984
127	Letter	983	
128	Legal Notice	992	

DEFENDANT'S EXHIBITS:

No.	Description	Trans. pages For Ident.	In Evidence
N-12	Letter from Kelly to Gates, 12/15/60		216
N-31	Employer's Statement to Hanover Insurance Co., 4/12/60		200
N-32	Letter from Gates to Collier 6/5/61	419	465

COURT'S EXHIBITS:

Letter	Description	Trans. pages For Ident.	In Evidence
G-21	Collier's Encyclopedia Contract 97B-51196, 12/2/61		1100
G-23	Collier's Encyclopedia Contract 97B-51322, 1/8/62		1100
G-24	Collier's Encyclopedia Contract 97B-51389, 1/20/62		1100
G-25	Collier's Encyclopedia Contract 97B-51391, 1/25/62		1100
G-26	Collier's Encyclopedia Contract 97B-51429, 2/1/62		1100
G-35	Letter from Boe to Gates, 12/14/61, & Letter, Boe to Gates, 3/14/62	1113	1115
G-21-A	Collier's Encyclopedia Contract 97B-51195, 12/4/61, etc.		1147
G-36	Memo from Kashiwa to Robertson, Castle & Anthony, 8/20/65	1149	1149
G-37	Printed P. F. Collier Inc. letter with blank forms attached	1170	1180
G-13	Application of Gates to Maryland Casualty Co. for bond, 1/20/54		1191
G-39	Graph, P. F. Collier, Inc., Sales 1960-1965, Tokyo Branch	1209	
B-23	List of Auditing and legal expenses of Collier re: Gates	1256	
A	Court Order of Judge Tooru Iwano (Japan Court)		182

Details of Business Transacted Ending - Oct. 16, 1962

Title	J. Civilian	J. Schools	Military	Australia	Total
Code	97B	99B	96B	98-B	"
Sets Received	2,313	186	1,480	1,623	5,602
Sales Price	269.50	239.50	199.50-699.00	312.50-416.25	199.50-699.
Gross Sales	623,353.50	44,547.00	491,973.18	650,389.12	1,810,262.8
Service Chg	46,260.00	3,720.00	21,413.68	65,810.21	137,203.8
Net Sales	577,093.50	40,827.00	470,558.50	584,578.91	1,673,057.9
Sales Disc't	26,664.00	362.34	1,667.68	-0-	28,694.0
Acc't Collections	584,262.92	17,704.46	343,544.65	447,566.90	1,403,078.9
Acc't Balance	12,426.58	26,480.20	148,428.53	202,822.22	390,157.5
Remitted	← 213,532.67 →		343,544.65	447,566.90	1,004,644.2
36% Comm.	-0-	-0-	-0-	210,448.41	210,448.4
34% "	196,211.79	13,881.18	159,989.89	-0-	370,082.8
7% "	40,396.55	2,858.82	32,939.10	40,920.52	117,114.9
12.5% "	77,919.19	-0-	61,496.65	81,298.64	220,714.4
10% "	-0-	4,454.70	-0-	-0-	4,454.7
1% "	5,770.93	408.27	4,705.59	6,503.89	17,388.6
5% "	28,854.68	2,041.35	23,527.93	29,228.95	83,652.9
Total Comm	349,153.14	23,644.32	282,659.16	368,400.41	1,023,857.9
Comm. Rec'd	238,670.27	13,881.18	129,210.48	16,700.58	(398,434.7
Comm. Due	110,482.87	9,763.14	153,448.68	351,699.83	625,394.5

EXHIBIT DD

Ex. D.D.

CLASSIFICATION OF RIGHTS

Gates Rights

ross Sales Amount		$1,810,262.80
et Sales Amount		1,673,057.91
ions: 36%	$210,448.41	
34%	370,082.86	
7%	117,114.99	
12.5%	220,714.48	
10%	4,454.70	
1%	17,388.68	
5%	83,652.91	$1,023,857.03
ney Received		398,462.51
Gates Rights		$ 625,394.52
count Balance-Gates Collecting		38,906.78
		$ 586,487.74
scounts Given		28,694.02
Gates		$ 557,793.72

Collier Rights

Gross Sales	$1,810,262.80
tes Total Rights	1,023,857.03
Total Rights	$ 786,405.77

EXHIBIT EE

Ex. E.E.

CLARIFICATION

Collections	$1,403,078.93
ollecting	38,906.78
Collecting	351,250.75
t Allowed	17,026.34
	$1,810,262.80

d to Collier	$1,004,644.22
d by Gates from Collections	398,434.71
	$1,403,078.93

SUMMARY

mitted to Collier	$1,004,644.22
llier Rights	786.405.77
	$ 218,258.45
nal Collected to 12/5/65	122,613.52
ip. tr. 892)	
Collier holding over its own rts.	$ 340,871.97

Collecting (above)	$ 351,250.75
ditional Collected	122,613.52
Collecting Revised to 12/5/65	$ 228,637.23